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Supreme Court, U.S.
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No. 94-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNN ATHMAN, JEFF DEUTSCH, MICHAEL DONOVAN, ROBERT KROGSENG, JAMES LOMER, MICHAEL McCARTHY, SAMUEL DAVID REAL, TIM ROUTEN, ANDREW TOOYAK, JR., and HANNS WEISS,

Petitioners,

vs.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when a jury expressly determines: (1) that an employer has kept accurate and adequate time records, and; (2) that an employee has not performed any additional uncompensated work, the employee has failed to carry his burden of proof under *Anderson v. Mt. Clemens Pottery Co.*

2. Whether the FLSA permits an employer to implement a schedule of flexible work hours which conforms with the Act's overtime pay requirements.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

Petitioners Lynn Athmann, *et al.* sued their employer, the North Slope Borough, under 29 U.S.C. § 207(a) of the Fair Labor Standards Act ("FLSA") claiming entitlement to overtime compensation. After a three week jury trial, the jury returned a special verdict finding: (1) the Borough had maintained accurate and adequate payroll records as required by the FLSA, and (2) none of the plaintiffs had any compensable "on-call" time or additional work time for which they had not been paid by the Borough. Judgment was entered on the jury verdict in favor of the Borough on June 27, 1992 by the United States District Court for the District of Alaska (Pet. App. A, pp. 1-2). An Amended Judgment and Order was entered by the District Court on November 18, 1992 (Pet. App. B, pp. 3-4). In an unreported memorandum decision of May 23, 1994, the United States Court of Appeals for the Ninth Circuit affirmed the District Court judgment (Pet. App. C, pp. 5-20).

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1994. A petition for rehearing was denied on June 29, 1994. The petition for certiorari was filed on September 26, 1994. The jurisdiction of this Court is apparently invoked by Petitioners under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since the statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix A, pp. 1-7.

United States Code

29 U.S.C. § 207(a)

Code of Federal Regulations

29 C.F.R. § 553.220
29 C.F.R. § 778.114
29 C.F.R. § 778.115
29 C.F.R. § 778.402
29 C.F.R. § 785.23

STATEMENT

A. Background

Petitioners are former or current law enforcement officers employed in remote Alaskan villages by the North Slope Borough Department of Public Safety ("the Borough"). The largest village has a population of 600 persons, the smallest 120, with the other villages having an average population of roughly 300, with approximately one-half the population of the villages being children. [RT I 117-119; RT II 21, 177-178, 255; RT IV 57, 165; RT V 20-21, 138; RT VI 151, 252; RT IX 151]. Law enforcement activities in the small villages occur on a peaks and valleys basis, with long periods of little or no activity. [RT II 75-81; RT X(II) 68-69, RT XI 155-173]. No more than approximately two dozen arrests occur in any single village in a year. [RT II 209; RT XII 135]. In some villages, no one is arrested during an entire year. [RT XII 135]. It was common for village officers not to have a single request for service during an entire two week work period. [RT II 75-81, 208-209; RT IV 88; RT VIII 27-28].

B. Work Schedules Of Village Officers

Because of the small populations in the remote villages and infrequent nature of activities requiring law enforcement services, the Borough adopted a two week work schedule of 75 hours of "flex time" for village officers. [Ex A, E, F, G, H, K, ID; RT II 27-28, 184; RT III 184-185; RT X 30; RT X(II) 68]. Officers originally worked a 40 hour workweek which was later reduced to a 37.5 hour workweek. [Ex H; RT III 184-185; RT V 21; RT X(II) 96-97]. The officers had only one standardized requirement in their schedule -- they were to maintain office hours at the village

station for approximately three hours a day, five days a week. [Ex K, ID; RT II 184, 211-217, 220; RT IV 59-60, 85; RT V 21; RT IX 212-213; RT XI 155]. Each officer was allowed to choose the two days off he preferred. [Ex K, ID; RT I 160-161, 211-217; RT XI 155; RT XII 97]. After an officer worked his three hours per workday, he had complete and full discretion as to how to "flex" the remaining 22.5 hours in the workweek, or the 45 hours in the two-week work period. [Ex K, ID; RT II 184-185, 219-220; RT III 185; RT IV 60-61; RT VII 61; RT VIII 183-184; RT X(II) 69; RT XI 155-174; RT XII 91-107]. If the officers were not actively responding to a call, they were free to engage in any activity they wished. [Ex K, ID; RT III 194-195; RT V 39; RT XI 155-174; RT XII 89-107].

Contrary to Petitioners' assertions, at no time were the officers instructed they were to be on active duty 24 hours a day, nor were they instructed to remain by their telephone, either at their home or at the office, to wait for telephone calls. [Ex K, ID; RT V 28-30; RT VII 168; RT XI 173]. Instead, they were instructed to use their judgment and discretion, to flex their time and use their time wisely to plan and allow for official work duties. [Ex K, ID; RT II 27-28; RT V 30; RT VII 243-244; RT IX 212-213; RT X(II) 68-69].

The Borough utilized two different recordkeeping procedures during the time embraced by the officers' complaint. From 1986 through 1988 timesheets for village officers were filled out in Barrow, Alaska by village unit supervisors. [RT X 31-35; RT XI 182-187]. The reason timesheets were initially filled out by village unit supervisors in Barrow was <u>solely</u> to avoid delays in paying village officers. [RT X 31-35; RT XI 182-185]. The remote villages in which the officers worked were isolated and unconnected by road to Barrow where the supervisors worked.

[RT I 147; RT X 31-35]. Poor weather frequently made air traffic between the village unreliable. [RT X 31-35; RT XI 182-185]. Each of the village officers knew exactly what they were being paid each and every payday. [RT X 31-35; RT XI 182-187]. As a courtesy to village officers, supervisors filled out officers' personal bank deposit slips, deposited their paychecks in Barrow banks and informed the officers of the amount deposited. [RT X 31-35; RT XI 182-187]. The officers were provided with paystubs showing regular hours worked, overtime hours worked, regular and overtime earnings, leave paid and all deductions. [RT X 31-35; RT XI 182-187]. Officers had regular telephone contact with their supervisors regarding the number of hours the officers worked and were paid for. [RT X 31-35]. Borough policy and procedure provided that if officers worked more than their assigned number of hours, all they had to do was contact their village unit supervisor and advise they had worked more than the assigned number of hours. [Ex A, C, K, ID; RT II 220].

The practice of having timesheets filled out in Barrow changed in 1988 when the villages began to acquire fax machines and the officers filled out and faxed their timesheets directly to Barrow. [RT II 21; RT IV 45-46, 63-64; RT V 139-140; RT X 35; RT XII 129-130]. By the fall of 1989, fax machines had been installed in each of the village public safety offices and all village officers were able to record their timesheets themselves and fax them directly to Barrow for timely payment. [RT IV 45-46; RT V 45-46; RT VII 162-163; RT X 35-36; RT XII 43, 129]. These timesheets contained a certification signed by the village officer which specified the hours listed were "actual hours worked" and "true and correct". [Ex NX; RT II 21-24; RT IV 63-64; RT V 46-48; RT V 141]. The officers themselves wrote in the hours they worked each day. [Ex NX; RT II

21-24; RT V 46-48]. The officers then signed those timesheets and certified the "hours shown are true and correct". [Ex NX; RT II 21-24; RT IV 63-64; RT V 46-48; RT VII 163-165]. The officers were paid the hours they themselves reported having worked. [Ex CV, CW1, CX1, DP, DQ, ET2, GR, HZ, IA, IB, IC1; RT V 46-48, 151; RT VII 163-165]. Significant amounts of overtime at the appropriate time and one-half rate required by the FLSA, which brought the officers to overtime rates of between $35 and $50 per hour, were paid to the officers for work in the villages. [Ex BO, BY, CV, CW1, CX1, DB, DP, DQ, EG, EH, ES, ET1, ET2, FD, FJ1, FX, GE, GF, GG, GK, GR, HZ, IA, IB, IC1; RT I 207-208; RT II 87-102; RT IV 52-55; RT V 24-36, 126-138; RT VI 159-165, 253-257; RT VII 69-70, 143-154, 224-226; RT VIII 80-83, 169-173].

C. The Jury's Factual Findings

Following a 14-day trial which included the testimony of 38 witnesses, admission of some 225 exhibits into evidence and extensive instructions on the law from the court, the jury returned a special verdict in favor of the Borough. [RT I-XIV, pp. 3-4 (of each volume); RT XIV, p. 41-71 (instructions); CR 328]. On special verdict the jury found: (1) the Borough maintained accurate and adequate payroll records as required by the FLSA and (2) none of the officers had any on-call time or additional hours worked for which they had not been compensated. [CR 328]. Judgment was entered on the verdict with the officers taking nothing. [CR 329].

The remainder of Petitioners' Statement is argument. To the extent a response is required, it will be addressed in Respondent's Argument.

ARGUMENT

I. Reasons For Denying The Petition For Certiorari.

A. The Ninth Circuit Court Of Appeals' Decision Regarding An FLSA Claimant's Burden Of Proof Is Not In Conflict With This Court's Decision In *Anderson v. Mt. Clemens Pottery Co.*

Petitioners' assertion that the Court of Appeals' decision conflicts with this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is mistaken. In *Anderson*, this Court observed:

> An employee ... has the burden of proving that he performed work for which he was not properly compensated....
>
> When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to

> keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA]. In such a situation we hold that the employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687 (emphasis added).

The Ninth Circuit's recordkeeping analysis in this case was in response to Petitioners' assertion that "the Borough failed to keep accurate records and therefore should have had the burden of proof to disprove the officers' estimate of overtime worked." Pet. App. C, p. 16. The Ninth Circuit concluded "the motion for summary judgment on the accuracy of the records was properly denied. Moreover, the verdict was not against the clear weight of the evidence, and the motion for a new trial was properly denied as well." Pet. App. C, p. 18.

Petitioners' recordkeeping argument to this Court is therefore based on a hypothetical question. An error in the burden of proof could only occur if the Borough's records

had been found to be inaccurate. The jury found the records were accurate. In spite of this, Petitioners continue to base argument on their hypothetical contention to the contrary.

Even if the burden of proof were an issue in this case, the Ninth Circuit's decision correctly noted that in order to take advantage of the shifting burden of proof established by *Anderson*, the employee must demonstrate two things: (1) that the employer kept inadequate work records; and (2) that the employee performed work for which he was not compensated. (Pet. App. C, p. 17). In the instant case, it is undisputed the jury found against the officers on both points: The Borough had not failed to keep accurate and adequate payroll records and none of the officers performed additional work for which they had not been paid. [CR 328] ([Petitioners' brief has a typographical error which reported "none" as "one".] Pet. App. C, p. 17).

In light of the factual findings by the jury, there is no basis to support Petitioners' contention that the Ninth Circuit misapplied *Anderson*. Moreover, the instructions given to the jury correctly set forth the burden of proof under *Anderson* and were, in fact, the instructions requested by Petitioners. [Cr. 289, pp. 27-28; CR 315, p. 3; CR 325a; C30 and C31].

B. There Is No Conflict With The Decisions Of Other Courts Of Appeals

The Court of Appeals decision that Petitioners failed to prove entitlement to overtime does not conflict with the decisions of any other circuit court regarding an FLSA claimant's burden of proof. For the reason noted above, this is another hypothetical question by Petitioners because it erroneously assumes the Borough failed to keep accurate records.

Moreover, none of the cases cited by Petitioners, including *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991), *Fegley v. Higgins, et al.*, 19 F.3d 1126 (6th Cir. 1994), *cert. denied*, 1994 U.S. Lexis 6378 (Oct. 3, 1994) or *Martin v. Dieriggi*, 985 F.2d 129 (4th Cir. 1993), supports the proposition that when a jury finds the employer kept accurate and adequate records of hours worked and the employee has failed to prove he performed work for which he was not paid, that the reduced burden of *Anderson* is applicable.

The cases relied on by Petitioners are specifically distinguishable from the case at bar because the jury found the Borough's records were accurate and adequate. In *DeSisto*, the court held "the Schools had violated FLSA recordkeeping provisions". 929 F.2d at 791. In *Fegley*, the employer "kept no records of his work" and admitted the employee worked unpaid overtime. 19 F.3d at 1132. The court in *Martin* found the employer had destroyed its records to prevent review by the Department of Labor. 985 F.2d at 132.

C. The Ninth Circuit Properly Decided A Fact Specific Issue Regarding The Flexible Work Hour Schedule Used By The Borough

In its Sections C and D, pages 19-28, regarding scheduling and timekeeping practices, there is no suggestion by Petitioners that the Ninth Circuit did not apply the correct law. Instead, Petitioners take issue with the Ninth Circuit's view of the facts. The Ninth Circuit's interpretation of the facts and application of the settled law to the facts is correct and does not raise an important issue for review by this Court. The law is well established that the FLSA affords employers flexibility to design reasonable scheduling and timekeeping practices where unique situations make calcula-

tion or computation of employee hours difficult if not impossible. See, e.g., *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944); *Halferty v. Pulse Drug Company, Inc.*, 864 F.2d 1185, 1190-91 (5th Cir. 1989); 29 C.F.R. § 785.23. Similarly, the FLSA does not require an employer to schedule hours in any particular manner. There is nothing in the FLSA which prevents an employer from implementing a schedule of flexible work hours which conforms with applicable overtime pay requirements of the FLSA. The number of hours worked by an employee and the manner in which those hours are worked are solely matters of contract between the employer and employees. *Tobin v. Little Rock Packing Co.*, 202 F.2d 234, 238 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953).

Contrary to Petitioners' unsupported arguments, there is simply nothing in the FLSA that prohibits an employer from creating a flexible schedule for employees where the demands of the job so require. Indeed, the Act and the Department of Labor regulations provide for such actions as scheduling fluctuating workweeks (29 C.F.R. § 778.114), paying employees at different rates of pay for different jobs performed at different times (29 C.F.R. § 778.115), paying employees based upon an average number of hours worked despite the fact that the hours do not necessarily represent actual hours worked, *see, e.g., Mullins v. Howard County*, 730 F. Supp. 667 (D. Md. 1990), and providing employees with a guaranteed salary that includes both straight time and overtime pay where the employees work irregular hours (29 C.F.R. § 778.402 *et seq.*). In addition, 29 C.F.R. § 553.220 specifically states that a police officer's tour of duty may include both scheduled and unscheduled periods of work.

The flexible schedule used by the Borough is, in the words of Petitioners themselves, "novel and unique". As a

result, the only real questions raised in the petition turn on the particular facts of this case alone and are of interest only to the parties to it. Petitioners are essentially asking this Court to make a third review of a lengthy trial record to see if the Court can find what a jury and two previous courts have been wholly unable to find -- proof that the Petitioners were somehow deprived of overtime compensation. This Court has ruled that such fact canvasing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Petitioners raise only questions turning entirely on the facts of this case, already resolved by a jury and two courts in favor of respondent and without any impact outside the factual specifics of this case. No important federal questions are raised by the Ninth Circuit's decision. Certiorari, therefore, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 21, 1994.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

United States Code

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Code of Federal Regulations

29 C.F.R. § 553.220 "Tour of duty" defined.

(a) The term "tour of duty" is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term as used in section 7(k), means the period which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include "shifts" which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and the time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in §553.227. The tour of duty does not include time spent working on an occasional or sporadic and part-time basis in a different capacity from the regular work provided in §553.30. The tour of duty does

not include time spent substituting for other employees by mutual agreement as specified in §553.31.

(d) The tour of duty does not include time spent in volunteer firefighting or law enforcement activities performed for another jurisdiction, even where such activities take place under the terms of a mutual aid agreement in the jurisdiction in which the employee is employed.

29 C.F.R. § 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding ofthe parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies

the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employees works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as ade-

quate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he received for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

29 C.F.R. § 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two ore more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exemptions permitting alternative methods of computing overtime pay in such cases are discussed in §§778.400 and 778.415 though 778.421.

29 C.F.R. § 778.402 The statutory exception provided by section 7(f) of the Act.

Section 7(f) of the Act provides the following exception from the provisions of section 7(a):

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek

in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

29 C.F.R. § 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).)